1993

Tolman v. Winchester Hills Water Company, Inc. : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

R.C. TOLMAN, an individual; Eaglebrook Corporation, a Utah Corporation; and Lava Bluff Water Company, Inc., a Utah Corporation,

Plaintiffs, Appellant, and Cross-Appellees,

v.

Winchester Hills Water Company, Inc.,

Defendant, Appellee, and Cross-Appellant.

No. 930761 CA

Priority No. 15

BRIEF OF APPELLEE AND CROSS-APPELLANT WINCHESTER HILLS WATER COMPANY, INC.

Appeal from a Jury Special Verdict
a Judgement on that verdict entered October 5, 1993,
in the Fifth District Court for
Washington County, Honorable J. Philip Eves, Civil No. 900503383

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STATEMENT OF JURISDICTION

The Utah Court of Appeals has jurisdiction over this cross-appeal pursuant to U.C.A §78-2(a)-3(2)(k) (Sup. 1994).

STATEMENT OF CROSS-APPEAL ISSUES

The cross-appeal issues presented for review are the following:

1. Did the district court err in issuing a directed verdict against Winchester Hills Water Company, Inc.'s, ("WHWC") claim that Eaglebrook Corporation, a Utah Corporation ("Eaglebrook") is liable to WHWC for 25 acre feet of water. The Appellate court examines the evidence in the light most favorable to the losing party. If there is a reasonable basis in the evidence and the inferences to be drawn therefrom to support a judgement in favor of the losing party the directed verdict cannot be sustained. Gourdin v. Sharon's Cultural Educ. Recreation Assoc., 845 P.2d 242, 243 (Utah 1992). This issue was preserved in the trial court at T. 786.

2. Did the trial court abuse its discretion by imposing the terms of the January 19, 1989 water agreement as terms of the constructive trust that it imposed upon Eaglebrook. In reviewing the trial's courts determination of an equitable remedy the appellate court will not upset the trial's court ruling unless it constitutes an abuse of discretion. Thurston v. Box Elder County, 892 P.2d 1034 (Utah 1995). This issue was preserved in the trial court at T. 787.

DETERMINATIVE CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, RULES AND REGULATIONS

There are no constitutional provisions, statutes, ordinances, rules or regulations which are determinative of the issues appealed by cross-appellant WHWC.

STATEMENT OF THE CASE

1. Nature of the Case, court proceedings and disposition below.

WHWC agrees that Tolman's Appellate brief correctly sets forth the nature of the case, the court proceedings and disposition of the case.

2. Facts relevant to Appellee Issues and Cross-Appeal Issues presented for review by WHWC.

Shad Investment and Development Company ("SIDCO") was organized in 1979 as a Utah Corporation to develop the Winchester Hills subdivision located in Washington County, Utah. (Trial Exhibits hereinafter "Ex.", P-1.) In 1980, the same individuals who organized SIDCO organized WHWC as a non-profit, private mutual water company to provide water service to Winchester Hills subdivision. Ex. P-4. SIDCO thereafter drilled wells, and built the water delivery system (hereinafter "water system") for WHWC but for some unexplained reason, did not transfer title to the water system to WHWC at that time. The developers-incorporators, through SIDCO, promised to provide each lot purchaser in Winchester Hills 1000 gallons of water a day. Some lot purchasers were promised 1600 gallons a day. (Trial transcript, vols. I-V, hereinafter "T." 222-224.) The developers-incorporators of SIDCO deeded water rights to WHWC when required during development. T. 281-282. By 1985 SIDCO had deeded some water rights to WHWC in order to provide water to lot owners as

promised. T. 144-145. Around 1985, all but two of the original incorporator-developers separated from SIDCO leaving Russell Walter and Tolman as the only developers, owners, directors, officers, and trustees of SIDCO and WHWC. T. 127-128. By 1988 SIDCO had developed 211 lots in Phases I and II of Winchester Hills. T. 219. Both developers (Walter and Tolman) agreed that they, through SIDCO, had to provide at least 255 acre feet of water to furnish the necessary water to the 211 developed lots. T. 227, 504. The two developers further testified that at the end of 1988 and early 1989, WHWC only had 205 acre feet of water available for use in Phases I and II. T. 238, 509-510.

In 1988, Walter and Tolman decided to terminate their business relationship. To accomplish this they agreed that SIDCO would transfer one-half of its assets and liabilities to Eaglebrook Corporation, a Utah for profit company ("Eaglebrook"), and that 100% of the stock of Eaglebrook would be transferred to Tolman. Tolman, in turn, would surrender his SIDCO stock to Walter. T. 147-197. As part of the assets transferred to Eaglebrook were 28 unsold lots in Phases I and II. SIDCO retained 23 unsold lots in Phases I and II. T. 577. As part of the liabilities transferred, Eaglebrook assumed "[o]ne-half of all other SIDCO liabilities through December 31, 1988." T. 236, Ex. P-15. In addition, Walter and Tolman agreed that SIDCO should divide and transfer the water system, one-third to SIDCO, one-third to Eaglebrook and the remaining one-third to WHWC. Exs. P-14, P-15. The agreement set forth as Ex. P-14, was initially reached by the parties on December 31, 1988. However, Tolman did not sign Ex. P-14, on December 31, 1988, and negotiations regarding the agreement

continued until February 25, 1989, when Ex. P-15 was signed by Walter, Tolman, SIDCO and Eaglebrook, which agreement was back dated to December 31, 1988 for tax purposes. T. 294-295.

On January 19, 1989, Walter, as president of both SIDCO and WHWC prepared and signed a water agreement between SIDCO and WHWC. See Ex. P-18. The water agreement memorialized prior water transfers totaling 235 acre feet from SIDCO to WHWC, and acknowledged that 30 acre feet of that water was promised to White Cliffs Investment Company ("White Cliffs"). Ex. P-18. In that agreement, WHWC acknowledged that 235 acre feet of water was sufficient to provide the promised water to Phases I and II and to White Cliffs. This was a calculation error on the part of Walter which he acknowledged at trial. T. 231. The January 19, 1989 Water Agreement further set forth that SIDCO and its assigns (Eaglebrook) would turn over their respective one-third interests in WHWC's water system when and if SIDCO and Eaglebrook developed further phases in the Winchester Hills area. Ex. P-18. On January 10, 1991, pursuant to other litigation, Tolman, Eaglebrook, and Lava Bluff Water Company, Inc,. each stipulated that they were bound by the terms of the January 19, 1989 agreement and that the January 19, 1989 agreement had been prepared in furtherance of the February 25, 1989 agreement. T. 248, Ex. P-59. However, Tolman took the position in this litigation that Eaglebrook's one-third interest in WHWC's water system was an asset that Eaglebrook owned outright, and could have been sold to someone in Russia. T. 502-503.

Almost immediately after signing the February 25, 1989, Agreement, Tolman and Walter begin disputing its meaning and implication. T. 183. Because of the ongoing dispute Tolman, acting as secretary of WHWC, signed a deed transferring 125 acre feet of water from WHWC to himself and his wife as joint tenants Ex. D-65. He did this because he felt that Walter had not lived up the February 25, 1989 Agreement. T. 542.

In May of 1989, a new board of trustees was elected to WHWC, which members consisted of lot owners in Winchester Hills area. T. 305. The new board soon learned that Tolman had deeded the 125 acre feet of water from the water company to himself and his wife. Board members asked Tolman to return the 125 acre feet of water to WHWC and Tolman refused. T. 543-545. Tolman's legal counsel warned him that what he was doing (holding the 125 acre feet of water) was wrong, and that he (Tolman) was inviting trouble if he did not return the water. T. 621-622, Ex. D-66. The WHWC board thereafter decided to issue a moratorium such that no further water hookups would be issued to any lots in Phases I and II until the 125 acre feet of water was returned. T. 544, 548. Rather then returning the 125 acre feet of water, Tolman, in an attempt to circumvent WHWC's moratorium, created Lava Bluff Water Company, Inc., a non-profit mutual water company ("Lava Bluff") for the purpose of servicing Eaglebrook lots in Phases I and II. T. 548-549. To accomplish this, Tolman caused Eaglebrook to transfer its one-third interest in WHWC's water system to Lava Bluff. T. 549-550, 734. Lava Bluff would therefor use the same water system as WHWC in Phases I and II. T. 549-550.

The one-third, one-third, one-third split and Lava Bluff's subsequent attempt to operate in Phases I and II caused WHWC numerous problems from regulatory agencies. T. 432-433, 750-751. Furthermore, because WHWC did not own the water system it could not purchase insurance. T. 747. Because of these problems, SIDCO later transferred its' one-third interest in the water system to WHWC. T. 255. Because of the 50 acre foot shortfall, SIDCO also transferred 25 acre feet of water to WHWC. T. 257.

Concurrently with this litigation, both WHWC and Lava Bluff made competing applications to the Public Service Commission to be the sole provider of water service in the Winchester Hills area. After a hearing, the Public Service Commission designated WHWC to be a publicly regulated utility that would be the sole provider of water service in the Winchester Hills area. As a publicly regulated utility, WHWC is obligated to provide service to any development in the Winchester Hills area. T. 446-449.

WHWC's first issue on cross-appeal centers on the court's conclusion that as of December 31, 1988, there was no water shortfall owed to WHWC by any of the Plaintiffs, and that pursuant to the January 19, 1989 Agreement, WHWC is bound by the statements that there was sufficient water to service Phases I and II. See Appellant's Addendum 2.

Tolman testified at trial that at the time he and Walter split the assets of SIDCO, there was at least a 50 acre foot shortfall of water for Phases I and II. T. 513-514. He further testified that he, through Eaglebrook, was obligated by the terms of the

February 25, 1989, Agreement for one-half of SIDCO's liabilities as of December 31, 1988, (T. 532) and that he, through Eaglebrook, would be liable for one-half of WHWC's water shortfall prior to December 31, 1988. T. 532. He then stated that there was no water shortfall prior to December 31, 1988. T. 533. He later attempted to explain that statement by stating that as of December 31, 1988, approximately 160 lots had been sold to third-parties and that to provide those lot owners with 1000 gallons a day would require 179 acre feet of water. As of December 31, 1988, WHWC owned more than 179 acre feet of water. Therefore, according to Tolman, WHWC had more than sufficient water rights for the needs of the lot owners as of December 31, 1988. T. 577-579. According to Tolman, SIDCO was responsible to provide water to the remaining 51 lots pursuant to the December 31, 1988 agreement. T. 580-581.

The other issue on cross-appeal is the court's ruling that Eaglebrook holds legal title to the one-third interest in the water system pursuant to a Court imposed constructive trust, according to the terms of the January 19, 1989 Agreement. WHWC agrees that the Court correctly imposed a constructive trust on Eaglebrook.[1]

However, the jury found that Tolman, as trustee of WHWC, breached fiduciary duties to WHWC by allowing one-third of the water system to be transferred to Eaglebrook. Appellant's Addendum 1. The court's ruling allows Eaglebrook to hold legal title to that one-third interest in the water system even though it obtained that interest by way of Tolman's breach of fiduciary duty. Pursuant to the law of

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[1] Appellant has not appealed imposition of the constructive trust.

constructive trusts, WHWC is entitled to have the one-third interest in the water system transferred immediately to WHWC.

SUMMARY OF APPELLEE ARGUMENT

WHWC asks this court to uphold the jury verdict finding Tolman liable to WHWC for attorney fees it expended pursuant to the third party attorney fee rule. Tolman claims that the court erred by submitting the third party attorney fee rule because he and Lava Bluff were in privity one with another with regards to the one-third interest in the WHWC water system allegedly owned by Lava Bluff. Tolman raises the privity issue for the first time on appeal. Tolman never presented any evidence at trial regarding his privity with Lava Bluff. He did not present jury instructions regarding privity issues. His objections to the jury instructions centered only on the issue of fiduciary responsibility. No privity issue objections were ever made to the jury instructions. This court should not allow Tolman to raise those issues for the first time on appeal. Furthermore, the evidence produced at trial shows that at all times Tolman treated himself and Lava Bluff as separate and distinct entities. For Tolman's privity arguments to succeed, he must convince this court to "wink" at the corporate existence of Lava Bluff. Such a finding is against public policy. Tolman should not be able to take advantage of Lava Bluffs' corporate entity when convenient and disregard it when inconvenient.

Finally, Tolman and Lava Bluff are not in privity one with another regarding the one-third interest in the water system that at one time Lava Bluff held title to. Tolman

never had title to the one-third interest in the water system. Therefore, Tolman and Lava Bluff's rights in the water system were never mutual or successive.

Tolman also claims that the court erred in the instructions it gave to the jury because the court did not discuss issues of privity in its' jury instructions. That issue is also raised for the first time on appeal. The only objection Tolman raised to the jury instructions regarded fiduciary responsibility. Tolman never proffered any jury instructions regarding privity issues nor did he raise privity issues with the court while objecting to the jury instructions. Tolman should not be able to raise this issue for the first time on appeal.

Tolman also argues that the jury instructions as given were confusing and internally inconsistent. Those issues are also raised for the first time on appeal. Tolman's objections to the jury instructions focussed only on fiduciary responsibility issues. By not objecting that the instructions were confusing and, or internally inconsistent, the trial court did not have an opportunity to make any corrections it deemed necessary. Furthermore, if there was an inconsistency in the instructions, it worked in Tolman's favor and therefore did not prejudice him. Tolman has set forth no special circumstances to warrant this court to assert its discretion to review the jury instructions even though Tolman did not preserve an appropriate objection to the instructions at trial. Finally, the jury instructions as given contain a correct statement of the third party attorney fee rule.

APPELLEE ARGUMENT

POINT I
THE COURT APPROPRIATELY ALLOWED THE "THIRD-PARTY ATTORNEY FEE RULE" TO BE SUBMITTED TO THE JURY

A. Tolman cannot argue on appeal that Lava Bluff is not a third person contemplated by the third-party attorney's fees rule inasmuch as he raises that claim for the first time on appeal.

Point I of Tolman's brief is based upon his claim that Lava Bluff was not a third person in the legal sense contemplated by the third-party attorney's fee rule inasmuch as Lava Bluff and Tolman were in privity of estate with regards to the one-third interest in the water system. As set forth below this claim is raised for the first time on appeal.[2]

Claims raised for the first time on appeal precludes their consideration on appeal. In Ong. Int'l (U.S.A.), Inc., v. 11th Ave. Corp., 850 P.2d 447, (Utah 1993), defendants claimed that the trial court should not have instructed the jury to consider wealth as a factor in assessing punitive damages. That claim was raised for the first time on appeal. In refusing to consider the issue the court said:

> "With limited exceptions, the practice of this court has been to decline consideration of issues raised for the first time on appeal." (Citations omitted) Because no valid exceptions exist, we do not address this issue.[3] 850 P.2d at 455.

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[2] Tolman has not complied with Rule 24(a)(5) Utah R. App. P. in that the Statement of Issues portion of his brief does not contain cites to the record showing where the issues he now raises were preserved at trial; or a statement of grounds for review of the issues not preserved at trial.

[3] Pratt vs. City Counsel, 639 P.2d 172 (Utah 1981) holds that the general rule that issues not raised at trial cannot be raised on appeal applies equally to constitutional issues, with the limited exception where a person's liberty is at stake. That exception is not applicable in this litigation.

In Collier v. Frerichs, 626 P.2d 476 (Utah 1981), Plaintiff argued on appeal that failure to drive at a prudent speed constituted negligence as a matter of law. In addressing that issue the court stated:

> Defendant counters the first argument by pointing out that Plaintiff did not raise the issue in the trial court. He neither objected to the stock instruction on negligence given to the jury, nor proposed an instruction that Defendant was negligent as a matter of law. No motion was made for a directed verdict or for a judgement not withstanding the verdict. See Rule 50, Utah R. Civ. P.; Henderson v. Meyer, 533 P.2d 290 (Utah 1975). Nor did Plaintiff propose an instruction directing the jury to find negligence. The issue may not be raised here for the first time. 626 P.2d at 477.

In this case Tolman's trial counsel never stated in opening statement or closing argument that Tolman or Lava Bluff, were one and the same entity or that they were in privity one with another as to the one-third interest in the water system. T. 85-98, 826-843. Tolman never submitted any jury instructions suggesting that he and Lava Bluff were one and the same, or that they were somehow in privity one with another as to the one-third interest in the water system. R. 1229-1268. Furthermore, he never brought to the court's attention privity issues when objecting to the jury instructions that the court presented to the jury. T. 799-800. Tolman made no motion for a directed verdict or for judgement notwithstanding the verdict pursuant to Rule 50, Utah R. Civ. P. Pursuant to Collier v. Frerichs, supra, Tolman cannot raise the privity issue for the first time with this court.

B. Throughout the litigation Tolman has treated himself, Eaglebrook and Lava Bluff as separate and distinct entities.

On pages 15-17 of Appellant's brief, Tolman cites to a few carefully selected portions of the 2262 page record and the 860 page trial transcript to support his

argument that the parties and the Court somehow lumped Tolman, Eaglebrook and Lava Bluff together as one entity. A review of the entire record, however, shows that Tolman, Eaglebrook and Lava Bluff were always treated as separate entities. The heading of the Verified Complaint lists R.C. Tolman as an individual, while Lava Bluff, is listed separately as a Utah Corporation. R. 1. Paragraph 7 of the general allegation portion of the Verified Complaint states that Lava Bluff was formed for the purpose of delivery of water to the Winchester Hills subdivision. R. 2. Paragraph 8 states that Lava Bluff was an owner of one-third of the water system. Tolman is not listed as an owner. R. 2. Paragraph 9 sets forth that Tolman is an owner of lots in Phases I and II of the Winchester Hills subdivision. R. 2. The first, second, and third causes of action in the Verified Complaint all deal specifically with Lava Bluff's ownership interest in the one-third of the water system. Tolman is not named as a co-Plaintiff to those causes of action. R. 4-7. The fourth through eighth causes of action are specific to Tolman seeking relief individually. R. 7-12. If Tolman was in privity with Lava Bluff as to the one-third interest in the water system, he should have been named as a party to the first, second, and third causes of action, and thus set up a privity claim. No where in the Verified Complaint does he allege an ownership interest in the water system.

At trial Tolman consistently took the position that he, Eaglebrook and Lava Bluff were distinct and separate entities. On direct examination, when Tolman was questioned about the January 19, 1989 agreement, the following exchange took place:

> Q. Nonetheless, at this point the court has determined that---that the agreement as it's written is binding upon Eaglebrook and Lava Bluff; Is that true?
>
> A. Yes. If they fulfill the responsibilities that are in the agreement. T. 391-392. (Emphasis added.)

Tolman further states during that same line of questioning as follows:

> A. After I read this agreement, nowhere in this agreement is Eaglebrook, Lava Bluff, R.C. Tolman ever mentioned. Nor does R.C. Tolman, Eaglebrook or Lava Bluff have any signatures agreeing to this written document as signees on it. T. 392.

Later, Tolman specifically testified why Lava Bluff was formed. His testimony is as follows:

> A. Yes. As soon as I discovered that the new water board wouldn't allow water on any of my lots that I sold in Winchester Phase I or II, I had Mr. Don Strong assist me in putting together a company called Lava Bluff Water Company, and filed the appropriate papers at the corporate office in Salt Lake City and had it become a corporation. And I immediately applied for permission through the Public Service Commission for an exempt status to operate as a water company.
>
> Q. Was Lava Bluff Water Company intended to be a mutual water company?
>
> A. Yes.
>
> Q. What is your understanding of what a mutual water company is?
>
> A. A mutual company is a water company that is mutually owned by its owners or by those people that it serves. T. 398.

The only time at trial that Tolam claimed that he, Eaglebrook and Lava Bluff might not be separate entities was when he was asked to explain how Lava Bluff could sell water hookups in May of 1989, when Lava Bluff was not incorporated until

some two months later on July 13, 1989. In an attempt to extricate himself from his own error in manipulating the two corporations he testified as follows:

> A. Through--I--I felt that Lava Bluff, owning a third of the system, had the right to use any portion of that third of the system to its own property.
>
> Q. When did Lava Bluff get one-third of the system? It wasn't incorporated until July 13th.
>
> A. Lava Bluff or Eaglebrook or R.C. Tolman?
>
> Q. So you are saying that they are all one and the same?
>
> A. They are all principal companies of myself.
>
> Q. Even though Lava Bluff wasn't incorporated until July 13th, of '89.
>
> A. Yes. And then Eaglebrook transferred that asset to Lava Bluff. T. 549-550.

As set forth in Point II below, Tolman never offered jury instructions indicating that he and Lava Bluff should be treated as one, or that they were in privity one with another as to the one-third interest in the water system. He did not raise as objections to the jury instructions the issue of privity. His counsel did not address those issues at all during his closing argument.

The record is clear that Tolman never took the position during the trial that he was in privity with Lava Bluff as to the one-third interest in the water system. He should not be allowed to do so now.

C. Tolman, Eaglebrook and Lava Bluff were not in privity one with another as to the one-third interest in the water system.

If this Court finds that Tolman's claims regarding privity between himself and Lava Bluff can be raised on appeal, the record shows that there was no privity

between Tolman and Lava Bluff. Tolman contends that Lava Bluff was not a third-person in the legal sense contemplated by the third-party attorney's fees rule. In support of that claim, Tolman states on page 13 of his brief: "[t]his follows when considered in the context of the facts surrounding Tolman's acquisition of the one-third interest in the Winchester Hills water system and his transfer of that one-third interest to Eaglebrook and, in turn, to Lava Bluff." (Emphasis added.) That statement mischaracterizes the record. Tolman never acquired a one-third interest in the water system. Rather, the one-third interest was transferred directly from SIDCO to Eaglebrook, pursuant to the February 25, 1989 agreement. Ex. P-15. Eaglebrook later transferred that one-third interest directly to Lava Bluff. T. 549-550. Tolman never acquired title to one-third of the water system. This fact is critical because Tolman argues that he was in such close privity with Lava Bluff that Lava Bluff was not a third person for purposes of third-party attorney's fee rule. Tolman quotes the case of Searle Brothers v. Searle, 588 P.2d 689, 691 (Utah 1978), for the definition of when a person is in privity with another. In that case privity was discussed in relationship with the doctrines of res judicata and collateral estoppel. The court's definition of privity in that context is as follows:

> The legal definition of a person in privity with another, is a person so identified in interest with another that he represents the same legal right. This includes a mutual or successive relationship to rights and property. (Citations omitted.)

An analysis of the facts in this case shows that Tolman, Eaglebrook and Lava Bluff do not meet the legal definition of "privity" as set forth in Searle. The one-third interest in the water system was transferred directly from SIDCO to Eaglebrook by a

Bill of Sale. Ex. P-20. Title to the water system was not transferred to or in Tolman's name. He therefore cannot claim mutual rights with Eaglebrook to the water system. Lava Bluff was not incorporated until July 13, 1989. T. 547. Lava Bluff's relationship to the one-third interest could not be mutual with Eaglebrook because it did not exist when Eaglebrook took title to the property. Eaglebrook later transferred the one-third interest to Lava Bluff not to Tolman. Tolman therefore cannot claim to have mutual rights to the one-third interest in the water system with Lava Bluff.

Tolman cannot claim that Lava Bluff received a successive right to the one-third interest from him. The record clearly shows that Tolman never acquired ownership of the one-third interest in the water system. Tolman cannot claim to have had a successive right to the one-third interest from or with Eaglebrook. He simply never obtained personal ownership in the one-third interest in the water system.

Neither can Tolman argue that he has the same legal right to the one-third interest in the water system as enjoyed by either Lava Bluff or Eaglebrook. Black's Law Dictionary defines a legal right as follows:

> Natural rights, rights existing as a result of contract, and rights created or recognized by law. Fine v. Pratt (Texas Civil App.) 150 W.2d 308, 311. Black's Law Dictionary Fifth Edition (1979)

The February 25, 1989 agreement transferred the one-third interest in the water company not to Tolman but to Eaglebrook. Eaglebrook later transferred the one-third interest to Lava Bluff. Tolman therefore cannot claim either a natural, or contractual right to the one-third interest in the water system.

Neither does Tolman have the same rights as Eaglebrook or Lava Bluff as created or recognized by law. Eaglebrook is a for-profit corporation. Its legal rights are defined by statute. U.C.A. § 16-10A-302. Eaglebrook, as a for-profit corporation, could use the one-third interest in the water system to make money. Eaglebrook could list the one-third interest in the water system as an asset on its balance sheet. Eaglebrook could depreciate that asset pursuant to federal and state tax laws. It could sell or transfer the asset.

Tolman's "rights" to the one-third interest in the water system were very different from Eaglebrooks. Tolman could not list the one-third interest in the water system on his personal balance sheet. He could only list his ownership interest in Eaglebrook on his personal balance sheet. Because the one-third interest in the water system was not his personal property he could not use it to make money for himself. If he tried to make a personal profit with the water system he would be in breach of fiduciary duties he owed to Eaglebrook. Neither could he depreciate it as an asset pursuant to federal and state tax laws. As an officer and director of Eaglebrook, Tolman would owe Eaglebrook a fiduciary duty of care to maintain and preserve the one-third interest in the water system for and on behalf of Eaglebrook. Eaglebrook, however, would owe no such fiduciary duty back to Tolman. Therefore Tolman and Eaglebrook's legal rights regarding the one-third interest in the water system are distinctly different.

Tolman's legal rights were also different from those of Lava Bluff with regards to the one-third interest in the water system. Lava Bluff was organized as a non-profit

water company. A non-profit mutual water company is used as a vehicle to supply water to a development. When properly organized and operated it is exempt from the regulatory oversight of the Public Service Commission. Garkane Power Co. v. Public Service Comm'n, 98 Utah 446, 100 P.2d 571 (1940). Pursuant to the Utah Business Corporation Act, Lava Bluff could not make a profit on the one-third interest in the water company. Utah Code Ann. § 16-6-20 (1953). Tolman therefore could not use Lava Bluff's one-third interest in the water system to make a personal profit, neither could he list it as an asset on his personal balance sheet. As a trustee and officer of Lava Bluff, he would owe a fiduciary duty to Lava Bluff with regards to maintaining and protecting the one-third interest for Lava Bluff. Lava Bluff, however, would owe no such fiduciary duty to Tolman. Tolman's legal rights regarding the one-third interest in the water system are also different.

Lava Bluff's legal rights as to the one-third interest in the water system are also different from Eaglebrooks. Lava Bluff could not use the one-third interest in the water system to make a profit. Eaglebrook could. In Searle Bros. the court found that appellant's interest in the property in question was neither mutual or successive. 588 P.2d at 689. Likewise, in this case Tolman's interest in the one-third interest in the water system is neither mutual or successive with either Eaglebrook or Lava Bluff.

D. A finding of privity between Tolman and Lava Bluff is against public policy.

For Tolman's "privity" argument to succeed, he must convince this court to "wink" at the corporate existence of Lava Bluff. In essence Tolman argues that this court should somehow "pierce the corporate veil" to find that he and Lava Bluff's

interest are one and the same with regard to the one-third interest in the water company.

Tolman's position is much like that described in Montana State Hwy. Com'n v. Robertson & Blossom, Inc., 441 P.2d 181, 184 (Mont. 1968) wherein the Montana supreme court stated:

> "[he] created the corporation in order to enjoy advantages flowing from its existence as a separate entity. He deeded to it without reservation of record. He held out to the public and particularly to the State of Montana the entity of the corporation. He cannot now ask that such existence be disregarded when it works to a disadvantage to him."

Tolman specially testified at trial that he set up Lava Bluff as an non-profit mutual water company in an attempt to get around the water moratorium put in effect by WHWC. The moratorium was put in place because Tolman wrongfully deeded to himself and his wife 125 acre feet of WHWC's water rights. The Lava Bluff corporate entity was created and used in an attempt to frustrate and harass WHWC. Now that the Lava Bluff corporate existence has caused Tolman to be liable to WHWC for damages, Tolman would have Lava Bluff's corporation existence disregarded. In Jones v. Tielborg, 727 P.2d 18, 25 (Ariz. App. 1986) the Arizona appellate court states that "[he] cannot take advantage of the corporate entity when convenient and disregard it when inconvenient." See also 19 Am. Jur. 2d Corporations § 2234 (1986).

The record is clear that Tolman has used corporations to run his different business interests. Eaglebrook and Lava Bluff were the only owners of the one-third interest the Winchester Hills water system. Tolman never obtained title to the one-third interest in the water system. Tolman was never in privity, as defined by the

Searle Bros. court, with either Eaglebrook or Lava Bluff with regards to ownership of one-third interest in the water system. The only way he could be is if Lava Bluff's corporate existence is disregarded. Tolman cannot take advantage of the corporate entity when convenient and disregard it when inconvenient.

POINT II
TOLMAN IS PRECLUDED FROM RAISING ISSUES REGARDING JURY INSTRUCTIONS BECAUSE HE DID NOT ADEQUATELY PRESERVE SUCH OBJECTIONS AT TRIAL

A. Tolman's trial counsel did not adequately or specifically object to the jury instructions he now claims were given in error.

The law requires specificity and timeliness of any objections to jury instructions. Nielsen v. Pioneer Valley Hosp., 830 P.2d 270 (Utah 1992). These requirements are set out in Utah R. Civ. P., 51. Rule 51 states in part; ". . . No party may assign as error the giving or the failure to give an instruction unless he objects thereto. In objecting to the giving of an instruction, a party must state distinctly the matter to which he objects and the grounds for his objection." See also: Godeske v. Provo City Corp., 690 P.2d 541, 546 (Utah 1994). In Nielsen, the supreme court said:

> This court has previously stated the underlying purpose of the specificity requirement of this rule. An objection to an instruction must be sufficiently precise to alert the trial court to all claimed errors and to give the judge an opportunity to make any corrections deemed necessary. (Citations omitted.) When the trial judge has such notice he or she is able to correct any error before the jury retires. (Citations omitted.) The specificity requirement also serves the purpose of preserving the objection for appeal. (Citations omitted.) 830 P.2d at 271-272.

Tolman's counsel had an opportunity to set forth any and all objections prior to the instructions being read to the jury. T. 798. Tolman's objections are set forth in their entirety as follows.

> Mr. Dunn: The exceptions that I have relate to the special--first of all, to the special verdict form. I do not believe that the law is adequate or requires a--or enables a jury to award attorney's fees in any way in this particular case. And based on that, the special verdict of the jury form, items seven and eight, are improperly included.
>
> I object to the instruction in the---in the--the instructions themselves that relate to those particular issues--specifically any instruction that deals with fiduciary responsibility--because the only damage that can be claimed is the attorney's fees. I do not believe fiduciary responsibility or breach of fiduciary responsibility should be included to the jury, and therefore, based on that, I would except--take exception to Instruction No. 13, No. 14, No. 15, No. 16. Again, it centers around the--even taking the issues of damages being attorney's fees. And for that purpose, I would except those particular items. T. 799.

Tolman's objections focused on "fiduciary responsibility" issues. Tolman's trial counsel did not address or raise privity issues when objecting to the jury instructions. Tolman's appellate counsel raises that issue for the first time on appeal.

Tolman's objections were not "sufficiently precise" to alert the trial court to the claimed error regarding "privity" issues. The judge never "had an opportunity to make the corrections deemed necessary." Nielsen v. Pioneer Valley Hosp., 830 P.2d at 271. This is made plain by the court's response to counsel's objections.

> The Court: All right. And just so the record is clear, we had discussed Mr. Dunn's exceptions prior to going on the record. The court is relying on the case of South Sanpitch Company v. Pack, 765 P.2d 1279, for the proposition that if there was a breach of fiduciary duty, attorney's fees incurred in litigation with third parties to correct the effects of that breach may be assessed as damages by the--by the jury. And that's the reason for the inclusion of those instructions and those provisions in the special verdict form.
>
> Mr. Dunn: And it's my position--or the position of the Plaintiffs--that the interpretation applied by the Court to South Sanpitch is wrong. T. 799-800.

The judge addressed breach of fiduciary issues, because those were the issues counsel objected to. The judge did not address privity issues (as Tolman now urges this court to do) because they were not raised at that time. The jury instructions proffered by Tolman did not include any privity issues. R. 1229-1268. Additionally, Tolman's counsel did not refer to any privity issues in his closing argument. T. 826-843.

The record is clear that counsel's objection did not alert the trial court to privity issues at trial. Tolman should not be allowed to raise them now.

B. Tolman shows no special circumstances warranting this court to review errors in instructions which were not properly preserved.

The last clause of Rule 51 states that "the appellate court, in its discretion and in the interest of justice may review the giving or failure to give an instruction."

In Crookston v. Fire Ins. Exchange, 817 P.2d 789 (Utah 1991), defendant urged the Supreme Court to consider the propriety of a jury instruction that defendant had not objected to at trial. In holding that discretionary review was not appropriate in that case the court stated:

> "The last clause of Rule 51 does permit us to review 'instructional errors in the interest of justice.' However, 'it is incumbent upon the aggrieved party to present a persuasive reason' for exercising that discretion . . . and this requires 'showing special circumstances warranting such a review.'" Hansen v. Stewart, 761 P.2d 14, 17, (Utah 1988) (Citations omitted.) In State v. Eldredge, 773 P.2d 29-35, 36 (Utah 1989), we described the content of the analogous "manifest injustice" exception to the Utah Rule of Criminal Procedure 19(c)'s requirement that any instructional errors raised on appeal be first called to the trial's court attention by proper objection. We held that the term "manifest injustice" embodied the concepts of "plain error." See Eldredge, 773 P.2d at 35-36. The last clause of Rule 51 of the Utah Rule of Civil Procedure

> embodies the same context. See State vs Verde, 770 P.2d 1116, 120-122 (Utah 1989).

In the recent case of State v. Saunders, 259 Adv. Rep. 24, (Utah Ct. App. March 1995) this court set forth the elements necessary to establish plain error:

> To establish plain error, Defendant must show the following: (1) the instruction was erroneous; (2) the error should have been obvious to the trial court; (3) but for the error there would be "a reasonable likelihood of a more favorable outcome for Defendant, or stated another way, that the instruction "undermines our confidence in the verdict." Citing State vs Dunn 850 P.2d 1201, 1208-1209, (Utah 1993).

Tolman argues that the jury instruction "did not provide the jury with any guidance as to the legal concepts of "connectedness" or "privity" which would allow them to determine whether Lava Bluff was sufficiently distinguishable from Tolman for purposes of the third-party attorney fee rule . . ." Appellant's brief p. 21. Such provisions were not included in the jury instructions because, as set forth above, there was no evidence of "connectedness" or "privity" presented at trial. Neither did Tolman proffer any such jury instructions regarding those issues. Furthermore, Tolman did not raise these issues when he objected to the jury instructions that were given. Because Tolman did not raise the "connectedness" or "privity" issues at trial or while objecting to the jury instructions any alleged error in the instructions could not have been obvious to the trial court. Tolman has not established that the trial court committed "plain error" or anything like into it in this case. He comes no where near making the required showing of special circumstances which would warrant review of the jury instructions under the discretionary clause of Rule 51. Here, as in Crookston, there

was simply a failure of trial counsel to preserve an appropriate objection to the jury instructions. 817 P.2d at 799.

Tolman attempts to circumvent the high standard required in making a showing of special circumstances as set forth in Crookston by citing Nielsen v. Pioneer Valley Hosp., supra, for the proposition that it is appropriate to exercise such discretion where the potential for jury confusion about the trial courts instructions is substantial, and where there is a reasonable likelihood that the jury verdict may have been different absent the confusion. Appellant's brief. P. 20. Nielsen was not a case where the court was called on to decide whether or not appellants had made the required showing of special circumstances as called for by Crookston v. Fire Ins. Exchange, supra. In Nielsen, the Supreme Court found that while counsel's "objections where not textbook examples of specificity it did direct the courts attention to the claimed error." 830 P.2d at 272. Thus the objection was preserved for appeal. Only after that finding did the court reach the merits of the jury instruction issues on appeal.

That is not the case here. Tolman raises "privity" issues with regards to the jury instructions for the first time on appeal. He has presented no special circumstances that would warrant this court to assert its discretion to review the jury instructions in light of the privity issues.

C. The jury instructions were not confusing.

Tolman claims that the jury instructions were confusing and contradictory because they did not deal with the issues of "connectedness" or "privity". Those

issues were not addressed because they were not raised by Tolman at any time during trial, or before the jury instructions were read to the jury.

Tolman also argues that the jury instructions given caused confusion because of a question raised by the jury during deliberation. The only question raised by the jury regarding the issues that Tolman objects to was a question expressed by the jury as to paragraph 3 of Instruction No. 16. Court Ex. 2. The specific question of the jury reads; "We are having a hard time understanding no. 3 on Instruction No. 16. Will you please clarify what is meant by it." The court responded as follows:

> "It is a factual question which you're going to have to determine. And that question is simply whether or not Mrs. Tolman was somehow connected with the act of Mr. Tolman in signing the April 19, 1989 deed which contained the language attempting to transfer some water rights from the water company." T. 848.

The court sufficiently clarified the jury's question and therefore it does not warrant review by this court.

D. Tolman's argument that Instruction No. 15 is internally inconsistent is raised for the first time on appeal.

Finally, Tolman argues that Instruction No. 15 is internally inconsistent. This argument also appears to be raised for the first time on appeal. When Tolman's counsel objected to Instruction No. 15, his objection focused only upon "fiduciary responsibility." "I do not believe fiduciary responsibility or breach of fiduciary responsibility should be included to the jury, and therefore, based on that, I would except---take exception to Instruction No. 13, No. 14, No. 15, No. 16." (Emphasis added.) T. 799. Counsel did not raise the issue of internal inconsistency in Instruction No. 15. Tolman's objection was not "sufficiently precise" to alert the trial

court to the claimed error regarding any "internal inconsistency" in Instruction No. 15. The judge never "had an opportunity to make the corrections deemed necessary," as enunciated in Nielsen v. Pioneer Valley Hosp., 830 P.2d at 271. Tolman never offered his own jury instruction to resolve the "internal inconsistency" of Instruction No. 15. Neither did he make a motion for a directed verdict or for judgement notwithstanding the verdict based upon the "internal inconsistency" of Instruction No. 15. He should not be able to raise the issue with this court for the first time. Nielsen v. Pioneer Valley Hosp., supra; Collier v. Frerichs, supra. Furthermore, Tolman has not met the standard set forth in Crookston of showing special circumstances to warrant discretionary review by this court.

E. Instruction No. 15 is a correct statement of the law.

Jury Instruction No. 15 reads in full as follows:

Instruction No. 15:

Damages for Breach of Fiduciary Duty

> WHWC seeks damages from Mr. Tolman for breach of fiduciary duties. The damages sought are the reasonable attorney fees that it has expended in defending against Lava Bluffs' claims in this lawsuit.
>
> However, before you can find Mr. Tolman liable to pay Winchester Hills Water Company's reasonable attorney fees, you must find:
>
> 1. That Mr. Tolman's breach of fiduciary duty resulted in Lava Bluffs Water Company suing Winchester Hills Water Company in this action.
>
> 2. That Lava Bluffs Water Company's lawsuit against Winchester Hills Water Company was a naturally foreseeable result of Mr. Tolman's breach of fiduciary duty to Winchester Hills Water Company.
>
> 3. That Lava Bluffs Water Company was not connected with Mr. Tolman's original breach of fiduciary duty.

> If you find that each of these three (3) elements exist, you should find that Winchester Hills Water Company is entitled to reasonable attorney fees from Mr. Tolman. The court will determine the amount of attorney fees at a later date.

Instruction No. 15 is a correct characterization of the third party tort rule found in both South Sanpitch v. Pack, 765 P.2d 1279 (Utah App. 1988) and Morgan v. Roller, 794 P.2d 1313, 1315 (Wash. App. 1990). South Sanpitch states: "[W]hen the natural consequence of one's negligence is another's involvement in a dispute with a third party, attorney fees reasonably incurred in resolving the dispute are recoverable from the negligent party as an element of damages." 765 P.2d at 1282. Morgan v. Roller's characterization of the third party tort rule is as follows: " [A] wrongful act or omission of [Tolman]... toward [WHWC]; such act or omission exposes or involves [WHWC] in litigation with [Lava Bluff] and [Lava Bluff] was not connected with the original wrongful act or omission of [Tolman] toward [WHWC]." Morgan v. Roller, 794 P.2d at 1315.

WHWC put on evidence at trial that Tolman breached his fiduciary duty to WHWC when he, as a trustee of WHWC, allowed a one-third interest in WHWC's water system to be transferred to Eaglebrook. Eaglebrook later transferred the one-third interest in the water system to Lava Bluff. Lava Bluff then sued WHWC, claiming, among other things, that WHWC owed Lava Bluff "rent" for using Lava Bluff's one-third interest in the water system.

The jury correctly found that the suit by Lava Bluff was the end result of Tolman's breach of his fiduciary duty to WHWC.

F. If Subpart (2) of Instruction No. 15 was inconsistent, the inconsistency is in Tolman's favor.

The third party tort rule as characterized in South Sanpitch requires a finding that the litigation was a natural consequence of Tolman's negligence. 756 P.2d at 1282. Tolman claims that instruction No. 15(2) is internally inconsistent because the litigation by Lava Bluff could not have been reasonably foreseen at the time of Tolman's breach of fiduciary duties because Lava Bluff was not then in existence. However, the law of negligence and foreseeability does not require such specificity. In Steffensen v. Smith's Mgt. Corp., 862 P.2d 1342, 1346 (Utah 1993) the Supreme Court stated:

> "What is necessary to meet the test of negligence and proximate cause is that it be reasonably foreseeable, not that the particular accident would have occurred, but only that there is a likelihood of the occurrence of the same general nature." Rees v. Albertson's Inc., 587 P.2d 130, 133 (Utah 1978); Glenn v. Gibbons v. Reed Co., Utah 2d 308, 265 P.2d 1013, 1016 (Utah 1954).

See also, 57A Am. Jur 2d Negligence § 515 (1989) which reads in part:

> Consequences which follow in unbroken sequence without an intervening efficient cause, from the original negligent act are natural and proximate; and for such consequences the original wrongdoer is responsible, even though he could not have foreseen the particular results which did follow. 57A Am. Jur 2d § 515.

In this case, the Subpart (2) of Instruction No. 15 is more specific than required by Steffensen, supra. The instruction asked the jury to determine if the litigation with Lava Bluff was a naturally foreseeable result of Tolman's breach of fiduciary duty. Steffensen only requires the jury to find that litigation, generally, be a foreseeable result of Tolman's breach of fiduciary duty. Because Subpart (2) is more specific than

what the law of negligence and foreseeability requires, Instruction No. 15 actually worked to Tolman's advantage. Even so, the jury still found against him.

The jury did not express confusion as to Instruction No. 15. No questions were raised as to Subpart (2) of Instruction No. 15. As set forth in Rees v. Albertons, 587 P.2d 130, 133 (Utah 1978), "the jury was entitled to base its judgement, not only on the facts shown, but to indulge such reasonable inference as may be fairly drawn therefrom."

G. If Instruction No. 15 is internally inconsistent, the inconsistency is not so prejudicial as to require appellate review.

If Subpart (2) is internally inconsistent, the inconsistency worked in Tolman's favor and is, therefore, harmless. In Steffensen, supra, where the rule regarding foreseeability was misstated in jury instructions the court said, "[N]o trial is perfect, and in many proceedings there is some technical error. However, to reverse a trial verdict, this court must find not a mere possibility, but a reasonable likelihood that the error affected the result." Steffensen, supra, 862 P.2d at 1347. Tolman has not shown this. Indeed, Subpart (2), if in error, was in Tolman's favor and the jury still found against him.

This Court has said that error in instructing a jury will result in reversal only when the party challenging the instruction demonstrates prejudice from all of the instructions taken as a whole. Ames v. Maas, 846 P.2d 468, 471 (Utah App. 1993). The Court, in determining prejudice looks at the evidence and circumstances of the case in the aggregate. "Whether the giving of an instruction constitutes reversible error must be determined by whether all the instructions read in harmony fairly

presented to the jury in a clear and understandable way the issues of fact and applicable law." Ames citing Anderton v. Montgomery, 607 P.2d 828, 834 (Utah 1980).

In this case the instructions as a whole correctly state the law as set forth in South Sanpitch, supra. The jury was presented with a clear understanding of the issues of fact and the applicable law to be applied to the facts.

Instruction No. 15 follows the rule of South Sanpitch v. Pack and Morgan v. Roller in setting forth the third party tort rule.

APPELLEE CONCLUSION

For the reasons set forth above, WHWC urges this court to uphold the jury's verdict that Tolman is liable to WHWC for attorney's fees expended by WHWC in defending against claims brought by Lava Bluff against WHWC.

SUMMARY OF CROSS-APPEAL ARGUMENT

WHWC contends that the trial Court erred in issuing a directed verdict against WHWC on WHWC's claim that Tolman, through Eaglebrook, is liable to WHWC for 25 acre feet of water shortfall. A review of the evidence in the light most favorable to WHWC shows that there was a reasonable basis in the evidence and the inferences to be drawn therefrom to support a judgement in WHWC's favor regarding Eaglebrook's liability to provide WHWC 25 acre feet of water. Tolman agreed that SIDCO was to provide water to WHWC for the lot owners in Winchester Hills. Tolman agreed that at the end of 1988 and early 1989 SIDCO had not provided at least 50 acre feet of water to WHWC. Tolman further agreed that pursuant to the February 25, 1989 agreement, he, through Eaglebrook, was liable for one-half of SIDCO's liabilities through December 31, 1988. He further agreed that he, through Eaglebrook, would be liable for one-half of any water shortfall that SIDCO owed to WHWC through December 31, 1988. The jury could infer from Tolman's testimony that there existed a 50 acre feet of water shortfall as of December 31, 1988, and that Tolman, through Eaglebrook, would be liable for one-half of that water shortfall. WHWC also contends that there is an issue of fact as to whether or not there was a water shortfall owed to WHWC at the end of 1988 and whether or not WHWC is a third party beneficiary of the February 25, 1989 agreement. The court should have let WHWC's claims regarding the 25 acre feet shortfall of water go to the jury for resolution of those factual issues.

WHWC also contends that the Court abused its discretion when it allowed Eaglebrook to retain legal title to one-third of the water system by way of a constructive trust even though the jury found that Tolman breached his fiduciary duties as a trustee of WHWC when he allowed Eaglebrook, his wholly owned corporation, to obtain one-third of the water system through that breach. Eaglebrook later transferred its one-third interest in the water system to Lava Bluff. The court ordered Lava Bluff to return that one-third interest in the water system to Eaglebrook. The court then imposed a constructive trust upon the one-third interest held by Eaglebrook, and conditioned Eaglebrook's holding of the one-third interest upon the terms of the January 19, 1989 agreement, which terms state that Eaglebrook is to incrementally give back its' legal title to one-third of the water system to WHWC if and when Eaglebrook chooses to further develop in the Winchester Hills area. WHWC contends that the court should have ordered Eaglebrook to immediately turn over its legal title to the water system to WHWC. The purpose of a constructive trust is to restore to the Plaintiff the property of which it has been unjustly deprived, and to take from the Defendant the property, the retention of which, would result in an unjust enrichment to the Defendant; or in other words, to put each of them in the position they were in before the Defendant acquired the property. That did not happen in this case. The court's ruling allows Eaglebrook to keep legal title to one-third of the water system even though the jury found that Eaglebrook obtained it by way of Tolman's breach of fiduciary duty to WHWC.

CROSS-APPEAL ARGUMENT

POINT I
THE COURT ERRED IN ISSUING A DIRECTED VERDICT AGAINST WHWC ON WHWC'S CLAIM THAT EAGLEBROOK WAS LIABLE TO WHWC FOR 25 ACRE FEET OF WATER.

A. Evidence was presented that would support a judgement in WHWC's favor regarding its claim that Eaglebrook owed WHWC 25 acre feet of water.

Gourdin v. Sharon's Cultural Educ. Recreational Assoc., 845 P.2d 242, 243 (Utah 1992) sets forth the standard of review for a directed verdict.

> [O]n appeal from a directed verdict, '[w]e must examine the evidence in the light most favorable to the losing party, and if there is a reasonable basis in the evidence and in the inferences to be drawn therefrom that would support a judgement in favor of the losing party, the directed verdict cannot be sustained.' Management Comm. v. Graystone Pines, Inc., 652 P.2d 896, 898 (Utah 1982) (Footnote omitted).

A review of the evidence in a light most favorable to WHWC shows that SIDCO was organized as a corporation to develop the Winchester Hills Subdivision. Ex. P-1. The developers-incorporators, through SIDCO, promised to provide each lot purchaser in Winchester Hills 1000 gallons of water a day. Some lot purchasers were promised 1600 gallons a day. T. 222-224. The same individuals who organized SIDCO organized WHWC for the purpose of providing water service to the lots in the Winchester Hills subdivision. Ex. P-4. The developers-incorporators of SIDCO deeded some of water rights to WHWC. T. 281-282. Sometime in 1985, all but two of the original developers-incorporators separated from SIDCO leaving Walter and Tolman as the only developers, owners, directors, officers, and trustees of SIDCO and WHWC. T. 136-137. By 1988 SIDCO had developed 211 lots in Phases I and II of Winchester Hills. T. 219. Both developers (Walter and Tolman) testified that they,

through SIDCO were obligated to provide at least 255 acre feet of water to WHWC to furnish the necessary water to the 211 developed lots. T. 227, 504. The two developers testified that at the end of 1988 and early 1989, WHWC only had 205 acre feet of water available for the 211 lots located in Phases I and II. T. 238, 509-510.

In 1988, Walter and Tolman decided to terminate their business relationship. To accomplish this they agreed that SIDCO would transfer one-half of its assets and liabilities to Eaglebrook, and that 100% of the stock of Eaglebrook would be transferred to Tolman. Tolman, in turn, would surrender his SIDCO stock to Walter. T. 147-197. Part of the assets transferred to Eaglebrook were 28 unsold lots in Phases I and II. SIDCO retained 23 unsold lots in Phases I and II. T. 577. As to liability, Eaglebrook assumed one-half of all SIDCO liabilities through December 31, 1988. T. 236. Ex. P-15. Tolman and Walter's agreement was memorialized by a written agreement signed by the parties on February 25, 1989. It was back dated to December 31, 1988 for tax reasons. T. 294-295.

On January 19, 1989, Walter, as president of both SIDCO and WHWC prepared and signed a water agreement between SIDCO and WHWC. Ex. P-18. The January 19, 1989 agreement was prepared in furtherance of the February 25, 1989 agreement. T. 248, Ex. P-59. In the January 19, 1989 agreement, WHWC acknowledged that 235 acre feet of water was sufficient to provide the required water to the lot owners of Phases I and II, and further acknowledged that 30 acre feet of that water was promised to White Cliffs Investment Company. Ex. P-18. The 235 acre feet as set forth in the January 19, 1989, agreement was a calculation error by Walter which he

acknowledged at trial. T. 231. As set forth above, both Walter and Tolman agreed that they, through SIDCO had to provide at least 255 acre feet of water to furnish the necessary water for the 211 developed lots. T. 227, 504. Both developers further testified that at the end of 1988 and early 1989, WHWC only had 205 acre feet of water available for use in Phases I and II. T. 238, 509-510. Tolman testified at trial that at the time he and Walter split the assets of SIDCO, that there was at least a 50 acre feet shortfall of water for Phases I and II. T. 513-514. He further testified that he, through Eaglebrook, was obligated by the terms of the February 25, 1989, agreement for one-half of SIDCO's liabilities as of December 31, 1988, (T. 532) and that he, through Eaglebrook, would be liable for one-half of WHWC's water shortfall prior to December 31, 1988. T. 532. After Walter realized that WHWC was 50 acre feet of water short for Phases I and II he had SIDCO transfer one-half of that shortfall to WHWC. T. 257. However, Tolman took the position, that SIDCO was obligated to provide the entire water shortfall to WHWC. T. 580-581.

From the evidence set forth above, the trier of facts could infer that SIDCO was obligated to provide at least 255 acre feet of water for the 211 lots it had developed in Winchester Hills Phases I and II. When Tolman and Walter, the two owners of SIDCO decided to terminate their business relationship, there existed a 50 acre feet water shortfall for Phases I and II. SIDCO was therefore obligated to make up the water shortfall by providing 50 acre feet of water to WHWC. When Tolman and Walter terminated their business relationship Walter kept one-half of the assets and liabilities

of SIDCO and transferred one-half of the remaining assets and liabilities to Eaglebrook Corporation which was fully owned by Tolman.

The trier of facts could further infer from the evidence that prior to execution of the January 19, 1989 water agreement between SIDCO and WHWC the 50 acre feet shortfall of water existed, and that the 235 acre feet of water (less 30 acre feet to White Cliffs) set forth in that agreement was a calculation error. Therefore, in spite of the language of the January 19, 1989 agreement, 50 acre feet of water was needed by WHWC to service the 211 lots in Phases I and II.

Pursuant to the terms of the February 25, 1989 agreement, Eaglebrook became liable for one-half of the liabilities of SIDCO up to and through December 31, 1988. The trier of fact could infer that as of December 31, 1988 there existed a 50 acre feet shortfall of water owed to WHWC. The trier of fact could infer that since Eaglebrook received 28 of the 51 unsold lots as of December 31, 1988, that Eaglebrook should also provide the water necessary to service those lots.

The trier of fact could infer that WHWC was a third party beneficiary under the February 25, 1989 agreement.

> For a third party to have an enforceable rights under a contract, then, that party must be an "intended beneficiary" of the contract, and the intention of the parties is to be determined from the terms of the contract as well as the surrounding facts and circumstances. Ron Case Roofing and Asphalt Paving, Inc., v. Blomquist, 773 P.2d 1382, 1386 (Utah 1989).

In this case, Tolman agreed that he, through Eaglebrook, was obligated for one-half of the WHWC's water shortfall. The trier of fact could therefore infer that WHWC was a third party beneficiary of the February 25, 1989 agreement. As a third

party beneficiary to the February 25, 1989 agreement, WHWC would be entitled to seek one-half of the water shortfall from Eaglebrook pursuant to Section I(b)(5) of the January 19, 1989, agreement which states that Eaglebrook will assume liability for "[o]ne-half of all other SIDCO's liabilities, through December 31, 1988." Ex. P-18. It would be reasonable for the jury to infer therefore that pursuant to the terms of the February 25, 1989 agreement, Tolman, through Eaglebrook, would be liable for one-half of the 50 acre feet water shortfall.

In this case, an examination of the evidence in a light most favorable to WHWC shows there is a reasonable basis in the evidence and the inferences to be drawn therefrom to support a judgement in favor of WHWC regarding the 25 acre feet of water it seeks from Eaglebrook. Therefore the directed verdict should not be sustained.

B. Issues of fact should have been presented to the jury relating to the 50 acre feet of water shortfall.

Management Comm. v. Graystone Pines, Inc., 652 P.2d 896, 897-898 (Utah 1982), states that:

> In directing a verdict, the court is not free to weigh the evidence and thus invade the province of the jury, whose prerogative it is to judge the facts. (Citations omitted) A directed verdict is only appropriate when the court is able to conclude, as a matter of law, that reasonable minds would not differ on the facts to be determined from the evidence presented. (Citations omitted)

In response to the evidence set forth above Tolman testified that at the time he and Walter split the assets of SIDCO there was at least a 50 acre feet shortfall of water for Phases I and II, but that as of December 31, 1988, there was no water

shortfall. T. 513-514, 533. Tolman attempted to explain this apparently contradictory statement by testifying that as of December 31, 1988, approximately 160 lots in Phases I and II had been sold to third parties, and that to provide those lots owners with 1000 gallons a day would require 179 acre feet of water. As of December 31, 1988, WHWC owned more than 179 acre feet of water. Therefore, according to Tolman WHWC had more than sufficient water rights to meet the needs of the lot owners as of December 31, 1988. T. 577-579. According to Tolman SIDCO was responsible to provide water to the remaining 51 lots after December 31, 1988. T. 580-581.

Tolman's testimony raises issues of fact as to whether or not there was a water shortfall as of December 31, 1988 and whether or not WHWC had sufficient water to service the lots in Phases I and II at the end of 1988. There is also an issue of fact as to whether or not WHWC was an intended third-party beneficiary to that portion of the February 25, 1989 agreement such that Eaglebrook would be liable to WHWC for one-half of the 50 acre foot of water shortfall. See Richards Irr. Co. v. Karren, 880 P.2d 6, 10 (Utah App. 1994) "The determination of intent [to benefit a third party] is a factual determination." Therefore, it was error for the trial court to rule against WHWC as a matter of law, and to direct a verdict in favor of Plaintiffs as to 25 acre feet of water shortfall issues. These issues should have been submitted to the jury.

POINT II
THE TRIAL COURT ABUSED ITS DISCRETION BY IMPOSING THE TERMS OF THE JANUARY 19, 1989 WATER AGREEMENT AS TERMS OF THE CONSTRUCTIVE TRUST IT IMPOSED ON EAGLEBROOK

Constructive trusts are trusts created by a court to carry out justice in a particular case. Proctor v. Forsyth, 480 P.2d 510, 514 (Wash. App. 1971). "They [constructive trusts] are entirely in invitium and are forced upon the conscience of the trustee for the purpose of working out right and justice or frustrating fraud." Id. at 514. In Hawkins v. Perry, 123 Utah 16, 253 P.2d 372 375, (1953), The Utah Supreme Court said that, "[e]quity imposes a constructive trust to prevent one from unjustly profiting through fraud or the violation of a duty imposed under a fiduciary or confidential relationship".

Although the trial court has considerable latitude in formulating their remedies,[4] "[a] constructive trust is [intended to be] remedial in character." Restatement (Second) of Trusts § 1, cmt. e. (1977). In this case, WHWC contends that the trial court abused its discretion by failing to create a trust that was remedial in nature and answered the demands of equity. An appellate court has the authority to overturn the trial court's decision if it is an abuse of discretion. Thurston v. Box Elder County, 892 P.2d 1034, 1041 (Utah 1995). When an appellate court finds an abuse of discretion, it "may either make a modification in the decree or remand for entry of a modified judgement by the trial court." (Citations omitted.) Higley v. Higley, 676 P.2d 379, 382

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[4] "A court of equity in decreeing a constructive trust, is bound by no unyielding formula, but is free to effect justice according to the equities peculiar to each transaction wherever a failure to perform a duty to convey property would result in unjust enrichment," Haws v. Jensen, 116 Utah 212, 209 P.2d 229, 236 (1949).

(Utah 1983). WHWC asks this Court to restructure the terms of the constructive trust so that Eaglebrook must immediately turn over its legal title to the one-third interest in the water system to WHWC.

The jury found that Tolman breached fiduciary duties, as a trustee of WHWC, by allowing one-third of the water system to be transferred to Eaglebrook. That breach of fiduciary duty allowed Eaglebrook to hold its one-third interest in the water system according to the terms of the January 19, 1989 agreement. Pursuant to the terms of the January 19, 1989 agreement Eaglebrook was to return its interest in the one-third of the water system to WHWC if and when it chose to further develop in the Winchester Hills area. Ex. P-18.

Eaglebrook then breached the terms of the January 19, 1989, agreement. Rather than turning over its one-third interest in the water system to WHWC as it developed, Eaglebrook, instead, transferred the one-third interest in the water system to Lava Bluff. Lava Bluff was created by Tolman to compete with and harass WHWC.

To remedy this problem the court concluded that Lava Bluff held mere legal title to the one-third interest in the water system and that WHWC held equitable title thereto, subject to the terms of the January 19, 1989 agreement. Appellants Addendum 2, page 6. The court then created a constructive trust. Page 6, Number 2 of the Judgment states:

> Lava Bluffs must return the one-third interest in said water system to Eaglebrook. The Court impresses a constructive trust upon the one-third interest held by Eaglebrook Corporation. Eaglebrook will hold that one-third interest in constructive trust for WHWC according to the terms of the January 19, 1989 Agreement.

This is an inequitable result since a constructive trust is supposed to:

> [R]estore to the [party] property of which he has been unjustly deprived and to take from the defendant property the retention of which by him would result in a corresponding unjust enrichment of the defendant: in other words the effect is to . . . put each of them in the position in which he was before the defendant acquired the property. RESTATEMENT OF RESTITUTION § 160, cmt. d (1937).

That has not happened in this case. WHWC and Eaglebrook have not been restored to the same position they were in before Tolman breached his fiduciary duty and allowed Eaglebrook to obtain legal title to a one-third interest in the water system. Instead the trial court has allowed Eaglebrook to keep the very interest in the water system that it gained by way of Tolman's breach of fiduciary duty. This is an abuse of discretion.

This injustice is further compounded by the fact that WHWC continues to be harmed by Eaglebrook's retention of legal title to the one-third interest in the water system. Because WHWC does not have legal title to the water system in full, it is unable to purchase insurance for the water system and its trustees. T. 747. This has also created several problems for WHWC with regulatory agencies. T. 432-433, 750-751. This has been compounded since WHWC has become a publicly regulated utility and the Public Services Commissions expects WHWC to obtain full title to the water system.

A. WHWC has the right to immediately recover legal title to the one-third interest in the water system now held by Eaglebrook.

The duties of a trustee of a constructive trust are simple.[5] "In the case of a trust by operation of law--constructive or resulting--the beneficiary is entitled to have the trust at once terminated and the legal title perfected in him by a conveyance or transfer from the trustee to him." 76 Am. Jur. 2d Trusts § 160 (1992). Courts view the immediate transfer of legal title from the trustee of the constructive trust to the beneficiary as an equitable remedy. Monroe Cattle Co. v. Becker, 13 S. Ct. 217 (1902). To avoid unjustly enriching a person guilty of fraud or breach of duty, equity demands that the property be returned to the one harmed. RESTATEMENT OF RESTITUTION § 160, cmt d. (1937) and RESTATEMENT (SECOND) OF TRUSTS § 1, cmt. e. (1977). In Stahl v. Stahl, 77 N.E. 67, 68 (Ill. 1906) the Court stated that "[i]n such case equity will enforce the obligation by impressing a trust upon the property in favor of the one who has been defrauded, by treating the actual devisee or legatee as a trustee holding the mere legal title, and by compelling him to carry the trust into effect through a conveyance to the one who is beneficially interested."

In this case, equity demands that Eaglebrook immediately convey legal title over to WHWC. There is no valid reason why Eaglebrook should have ever obtained legal title to a portion of the water system in the first place. There is no valid reason now for Eaglebrook to continue to hold legal title to the one-third interest in the water

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[5] "A constructive trust is imposed upon a person in order to prevent his unjust enrichment. To prevent such unjust enrichment an equitable duty to convey the property to another is imposed upon him." RESTATEMENT OF RESTITUTION § 160, cmt. c (1937).

system. The January 19, 1989 Agreement was negotiated to ensure that WHWC continued to provide water service to future developments in the Winchester Hills area. This is no longer a valid concern. Concurrently with this litigation the Public Service Commission designated WHWC a publicly regulated utility that would be the sole provider of water in the Winchester Hills area. As a publicly regulated utility WHWC is obligated to provide service to new developments within the Winchester Hills area. Since WHWC is required to provide water services to any development in the area, Eaglebrook is guaranteed water service. It has no valid reason to retain mere legal title to one-third of WHWC's water system.

Imposing a duty on Eaglebrook to immediately convey legal title to the one-third share of the water system that it holds in trust will also provide protection to WHWC. As soon as WHWC owns all of the interest in the water system, it will be able to obtain insurance for the water system and its trustees.

The terms of the constructive trust should also be changed pursuant to the well settled equitable principle that "where one party has acquired the legal title to property to which another has the better right, a court of equity will convert him into a trustee of the true owner and compel him to convey the legal title." Parduhn v. Rodman, 204 P.2d 869, 871 (Okla. 1949). In this case, WHWC's shareholders have a "better right" to the portion of the water system now held by Eaglebrook. The water system was paid for by the shareholders of WHWC when they bought their lots. The court has already concluded that WHWC has equitable title to the water system. By

requiring Eaglebrook to immediately transfer title to WHWC, title will be vested in the true owners.

In order to do equity and to remedy the abuse of discretion committed by the trial court, this Court should impose a duty on Eaglebrook, as trustee, to immediately convey legal title to the one-third interest in the water system it holds to WHWC.

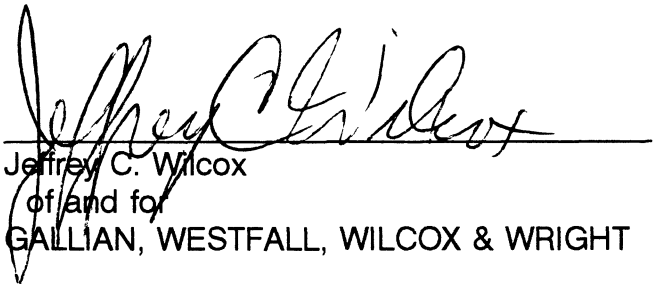
CROSS-APPEAL CONCLUSION

WHWC urges this court to set aside the directed verdict issued against WHWC and allow WHWC's claims that Tolman, through Eaglebrook, is liable to WHWC for 25 acre feet of water to be presented to the jury.

As to the constructive trust issue, this Court should find the trial Court abused its discretion and either order the trial court to alter the terms of the constructive trust such that

the one-third interest in the water system be immediately returned to WHWC, or this court should do the same through its equitable power.

RESPECTFULLY SUBMITTED this 5th day of July, 1995.



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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Brief of Appellee and Cross-Appellant Winchester Hills Water Company, Inc., was served this 5th day of July, 1995, to Plaintiff/Appellant's counsel via Federal Express, to the following:

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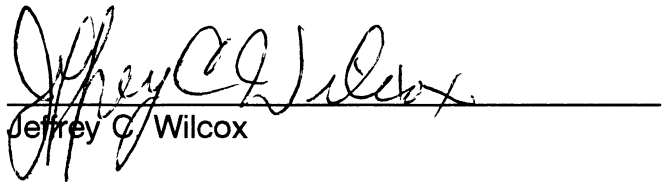

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